

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TRACY L. WILSON**  
Claimant

VS.

**MCDONALD'S**  
Respondent

AND

**KANSAS RESTAURANT & HOSPITALITY  
ASSOCIATION SELF-INSURED FUND**  
Insurance Carrier

Docket Nos. 1,043,354 &  
1,043,355

**ORDER**

Respondent and its insurance carrier (respondent) request review of the January 29, 2009 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant suffered an accidental injury arising out of and in the course of her employment with respondent on November 24, 2008 and granted the claimant medical treatment with Dr. Vosburgh to be paid by respondent.<sup>1</sup> The ALJ made no findings with respect to any accident occurring on November 10, 2008.<sup>2</sup>

The respondent requests review of the following issues:

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<sup>1</sup> This accident is the focus of Docket No. 1,043,354.

<sup>2</sup> This accident is the focus of Docket No. 1,043,355.

1. Whether the claimant met with personal injury by accident on November 10, 2008 and November 24, 2008;
2. Whether the claimant's alleged accidental injuries arose out of and in the course of her employment;
3. Whether the claimant's need for medical treatment arises out of her alleged accident of November 24, 2008, as opposed to her preexisting condition referable to her right knee.<sup>3</sup>

Respondent contends that the events on November 10, 2008 and November 24, 2008 as described by the claimant do not give rise to compensable claims based upon the principles set forth in *Johnson*<sup>4</sup>. Respondent also maintains that whatever claimant's complaints to her right knee, they are attributable to an earlier and unrelated event that predated her employment with respondent. In support of this argument respondent maintains the ALJ should have accepted the claimant's discovery deposition into evidence as that earlier testimony would substantiate respondent's contentions. Therefore, respondent requests that the ALJ's Order for Medical Treatment be reversed.

Claimant argues that the ALJ should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges two separate injuries, the first occurring on November 10, 2008 when she stepped from the curb, twisted her ankle and experienced a pop in her right knee. She sought no treatment and believed it was nothing "dramatic"<sup>5</sup> and went on with her day.

Claimant sought medical treatment on November 14, 2008 and reported an earlier injury to her right knee "2 weeks ago".<sup>6</sup> There is also a reference to claimant hitting her

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<sup>3</sup> Application for Review (filed Feb. 9, 2009).

<sup>4</sup> *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P/3d 1091, rev. denied 281 Kan. \_\_\_\_ 2006.

<sup>5</sup> P.H. Trans. at 12.

<sup>6</sup> *Id.*, Cl. Ex. 1 at 1 (Nov. 14, 2008 Stormont Vail Emergency Record).

“knee on door and now feels it ‘crack’ each time” the knee is straightened.<sup>7</sup> Nowhere in this record is there any reference to a work-related accident on November 10th, nor anything similar to what claimant described at the preliminary hearing. Claimant testified that she told the staff at the hospital of the November 10<sup>th</sup> accident, but she has no explanation for why it was not included. Additionally, she pointed out other inaccuracies within those records. She denies hitting her knee on a door and she also testified that contrary to the records, she did not fracture her *right* patella when she was younger. Rather, it was the left patella that was fractured.

By her own testimony, claimant recovered following this accident. She sought no further treatment and indicated that the pain “mostly went away” and was resolved.<sup>8</sup>

The second accident claimant alleges is said to have occurred on November 24, 2008. Claimant had been told she was working too slow and thus was rushing to pick up a customer’s order when she pivoted and felt her right knee pop. She sought treatment for that injury on November 26, 2008 and now seeks further treatment for her right knee complaints.

The ALJ granted claimant’s request for medical treatment in Docket No. 1,043,354 following his conclusion that claimant suffered “an additional injury of 11/24/08 when she twisted abruptly on her knee while at work. There is no evidence available to demonstrate her need for surgery stems from any cause other than the work accident of 11/24/08.”<sup>9</sup>

As noted by the ALJ, there is no apparent dispute that claimant twisted her knee while working on November 24, 2008. Likewise, there is no dispute that claimant had been counseled to speed up her work, decreasing on the delivery time for the customer’s food orders. And in doing so, claimant testified that she pivoted quickly and experienced an acute onset of pain when something in her knee “popped”. This history is echoed in the medical records. The dispute stems from the respondent’s belief that the act of pivoting while working is not a compensable event under the Kansas Workers Compensation Act as discussed in *Johnson*<sup>10</sup>.

In *Johnson*, the Kansas Court of Appeals held that “an injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 57.

<sup>9</sup> ALJ Order for Medical treatment. The ALJ made no findings with respect to Docket No. 1,043,355 and thus, that docketed claim is not at issue in this appeal.

<sup>10</sup> *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P/3d 1091, *rev. denied* 281 Kan. \_\_\_\_ 2006.

would not have been equally exposed to apart from the employment.”<sup>11</sup> This rule stems from that portion of the Act that provides as follows:

An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.<sup>12</sup>

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*<sup>13</sup> and *Boeckmann*.<sup>14</sup> But claimant’s injury in this case is distinguishable from *Martin*, *Boeckmann* and *Johnson*. While pivoting can occur whether at the workplace or not, being in a position to rush one’s movements, pivoting back and forth to deliver food orders is not. Moreover, the Court in *Boeckmann* distinguished cases in which “the injury was shown to be sufficiently related to a particular strain or episode of physical exertion” to support a finding of compensability.<sup>15</sup> This Board Member concludes that the Legislature did not intend for the “normal activities of day-to-day living” to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work. The November 24, 2008 accident is, therefore, compensable.

For these reasons, the ALJ’s Order for Medical Treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>16</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated January 29, 2009, is affirmed.

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<sup>11</sup> *Id.*, Syll. 1.

<sup>12</sup> K.S.A 2008 Supp. 44-508(e).

<sup>13</sup> *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

<sup>14</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

<sup>15</sup> *Id.* at 737.

<sup>16</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2009.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge